Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-6587

CLIFFORD HERRING,

Appellant,

v.

NEW YORK,

Appellee.

Appeal from the Appellate Division of the Supreme Court of the State of New York, Second Department

REPLY BRIEF FOR APPELLANT

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ARGUMENT

Appellee's argument that this case presents a waiver issue is without merit.

The only issue on this appeal is the right of a criminal defendant to closing argument in a non-jury trial. The statute in question which gives the trial judge discretion to preclude summations, assumes that there is no such right, and pursuant to the trial court's invocation of this statute, appellant was denied the right to summation. It

is disingenuous for the State to argue that this statute which abridges the constitutional right to summation in a non-jury trial, creates by its very existence a waiver of the right abridged when, under another statute, the defendant executes a waiver of a trial by jury. The underlying assumption of this argument is that the State may reasonably condition the exercise of the statutory right to a non-jury trial upon the waiver of the right to summation. The argument ignores the fact that the constitutional right to jury trial and the constitutional right to summation are separate and distinct and also distorts well-developed concepts of waiver.

While reasonable procedural regulations may be attached to the defendant's waiver of a jury trial, they may concern only those matters which relate directly to the waiver itself, such as the federal requirement that the court and prosecutor consent to the waiver or New York State's requirements of a written, court-approved waiver made in open court. *Cf. Singer* v. *United States,* 380 U.S. 24, 35 (1965); see also *Patton* v. *United States,* 281 U.S. 276, 312-313 (1930). None of the procedures discussed in *Singer* (380 U.S. at 36, 37) conditioned the waiver of a jury upon the defendant's waiver of an independent constitutional right, and the State's "legitimate interest" in insisting on a jury trial (*Singer* v. *United States,* 380 U.S. at 36) does not entitle it to impose such a condition. Once a defendant meets the reasonable procedural requirements for jury waiver as set forth in section 320.10, he has the right under New York law to be tried by the court. He cannot be penalized for exercising that right by being deprived of the right to be heard by counsel. Compare *Green* v. *United*

States, 355 U.S. 184, 194 (1954) (conditioning the exercise of the statutory right of appeal upon "waiver" of a valid plea of double jeopardy); see also *North Carolina* v. *Pearce,* 395 U.S. 711, 724-725 (1969) (imposing a penalty upon defendant for successful pursuit of statutory right to appeal). Where the State seeks to impose such an unconstitutional condition, as is implicit in appellee's argument, then the litigant's forced acceptance of the condition cannot operate as a waiver of his constitutional objection.

> "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of failure to accept it, and then to declare the acceptance voluntary * * *." *Garrity* v. *New Jersey,* 385 U.S. 493, 498 (1967), quoting from *Union Pac. R.R. Co.* v. *Pub. Service Comm.,* 248 U.S. 67, 69 (1918).

Appellant's choice of a non-jury trial did not, therefore, waive his right to object to the denial of summation.

Even if the State may condition waiver of a jury trial upon the waiver of the right to summation, no such waiver could be gleaned from this record. The existence of a statute which incorrectly provides that a constitutional right does not exist does not amount to a waiver of a federal constitutional right. Since, as demonstrated in our brief in chief, a defendant's right to have his attorney deliver a closing argument is essential to a fair criminal trial, the "strict standard" of establishing an "intentional relinquishment or abandonment of a known right or privilege" is applicable. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 241 (1973); *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1937). *Brookhart* v. *Janis,* 384 U.S. 1 (1965). Inherent in this

standard is the precept that waiver will not be presumed from a silent record but, rather, that every reasonable presumption against waiver will be indulged. *Carnley* v. *Cochran,* 369 U.S. 506, 516 (1962); *Glasser* v. *United States,* 315 U.S. 60, 70 (1941).

Indeed, even absent such presumptions against waiver, counsel's request to deliver a closing argument must dispel any thought that the right had been intentionally waived. The first and only explicit reference to closing argument on this record occurs at the close of the defense when counsel asked to be heard in spite of the court's statement that it would not hear summation.[1] It was only at that time that the court revealed to appellant that section 320.20(3)(c) deprived him of the right to have his attorney make a closing argument. All prior discussions between the court and appellant concerning the consequences of appellant's waiver of a jury trial did not extend beyond the waiver of the jury itself.[2] Similarly, the document which appellant signed recited only that he waived a jury trial with "full understanding of the rights which I waive hereby."[3]

Furthermore, given the statutory framework here, the suggestion of waiver appears to be one made of whole cloth by counsel for the State and the District Attorney. Contrary to the State's argument that the existence of section 320.20(3)(c) gives notice to a defendant that his waiver of a jury trial also waives his absolute right to summation, this statute simply gives warning that the constitutional deprivation may occur, not that it may not be objected to. At the same time the New York State Legislature enacted section 320.20(3)(c), it also enacted an identical provision applicable to non-jury misdemeanor trials, N.Y.C.P.L. §350.10(3)(c), which governs misdemeanor trials in which there is often no right to a jury trial.[4] Thus the New York rule that there is no right to summation in a non-jury case operates whether the non-jury trial is the result of a waiver or the result of a lack of entitlement to a jury. Consequently, counsel could—and did here—reasonably conclude that his client's waiver of the jury right did not subsume a waiver of his objection to the constitutional deprivation.

In sum, the only waiver which operated in this case was appellant's waiver of a jury trial. There was no waiver of the right to summation in a non-jury case because the State never afforded appellant that right, because such a waiver would constitute an improper condition upon his exercise of his statutory right to forego a jury, and because the record conclusively refutes the existence of an intentional relinquishment by appellant or his counsel of the right. To contend that appellant somehow tacitly waived his separate constitutional right to closing argument by his affirmative waiver of his right to jury trial finds no support in the statutory scheme, in the record, in the law of waiver or in common sense.

1. App. 92.
2. Brief of Attorney General, App. B at 24-26.
3. Brief of Attorney General, App. C at 30.
4. *Baldwin* v. *New York,* 399 U.S. 66 (1970).

Conclusion

Wherefore, for the foregoing reasons, appellant prays the judgment below be reversed.

Respectfully submitted,

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